No. 90-1791

In The
Supreme Court Of The United States
October Term, 1991

THE CONNECTICUT NATIONAL BANK,
Petitioner,

v.

THOMAS M. GERMAIN, TRUSTEE FOR
THE ESTATE OF O'SULLIVAN'S
FUEL OIL CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

JANET C. HALL*
G. Eric Brunstad, Jr.
Robinson & Cole
One Commercial Plaza
Hartford, CT 06103
(203) 275-8200

Counsel for Petitioner
The Connecticut National Bank

**Counsel of Record*

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

Does the court of appeals have jurisdiction pursuant to section 1292(b) of title 28 of the United States Code over certified interlocutory orders of the district court affirming, modifying or reversing orders entered by the bankruptcy court?

LIST OF PARTIES

Petitioner, The Connecticut National Bank ("CNB"), is a federally chartered banking institution and is a wholly owned subsidiary of Hartford National Corporation, which in turn is a wholly owned subsidiary of Shawmut National Corporation.

Respondent, Thomas M. Germain, is the Chapter 7 Trustee for the estate of O'Sullivan's Fuel Oil Co., Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit holding that it lacked jurisdiction under 28 U.S.C. § 1292(b) to consider CNB's appeal is reported at 926 F.2d 191 (2d Cir. 1991) and is reprinted in the Joint Appendix at pages 34-47.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decision of the Court of Appeals for the Second Circuit sought to be reviewed by way of the petition for a writ of certiorari was decided on February 15, 1991. The petition for a writ of certiorari was filed with this Court on May 16, 1991 and granted on October 15, 1991.

STATUTES INVOLVED[1]

28 U.S.C. § 158 (1988)

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under section (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

---

[1] In addition to the statutes reproduced herein, the following statutes which the case involves are reproduced in the joint appendix:
11 U.S.C. § 47(a) (repealed 1978)
11 U.S.C. § 305 (1990)
28 U.S.C. § 151 (1988)
28 U.S.C. § 157 (1986)
28 U.S.C. § 1293 (repealed 1984)
28 U.S.C. § 1334 (1990)
28 U.S.C. § 1651 (1949)
29 U.S.C. § 110 (1984)

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1291 (1988)

§ 1291. Final Decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292 (1988)

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

[(4) Repealed. Pub.L. 97-164, Title I, § 125(a)(3), Apr. 2, 1982, 96 Stat. 36]

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after

the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order,

if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court under section 1631 of this title.

(B) When a motion to transfer an action to the Claims Court is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court pursuant to the motion shall be carried out.

STATEMENT OF THE CASE

In 1981, First Bank, which later merged with the Petitioner, The Connecticut National Bank ("CNB"), entered into a secured lending relationship with O'Sullivan's Fuel Oil Co., Inc. ("O'Sullivan's"). (J.A. 35). Subsequently, O'Sullivan's fortunes declined and on January 18, 1984, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1146. (J.A. 35). CNB filed a proof of claim on its outstanding debt. (J.A. 35). On July 30, 1986, the bankruptcy court converted the Chapter 11 reorganization into a Chapter 7 liquidation, 11 U.S.C. § 1112, and appointed Thomas M. Germain as Trustee for the debtor's estate. (J.A. 35).

On May 29, 1987, the Trustee commenced suit against CNB in the Superior Court for the State of Connecticut alleging that, prior to and during the course of the bankruptcy proceedings, CNB breached its contract and committed numerous tortious acts against the debtor and the debtor's estate. (J.A. 13). The counts of the Trustee's complaint alleged various common law causes of action as well as violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a-110o (1991), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1988). (J.A. 35).

The Trustee's suit was removed to the bankruptcy court by CNB. (J.A. 36). On August 24, 1987, the Trustee filed a demand for a jury trial. (J.A. 13). After the district court dismissed the Trustee's RICO claim and denied his motion to withdraw the bankruptcy reference, CNB moved in the bankruptcy court on November 2, 1988, to strike the Trustee's jury demand. (J.A. 36). On September 6, 1989, the bankruptcy court denied CNB's motion to strike. (J.A. 7).

CNB appealed this denial to the district court as a final order and, alternatively, sought leave to appeal, both pursuant

to title 28 of the United States Code, section 158(a). (J.A. 36). The district court ruled that there was no right of appeal, but granted leave to appeal on November 14, 1989. (J.A. 8-11). The district court affirmed the bankruptcy court's denial of CNB's motion to strike and thereafter certified an appeal, exercising the power granted, under section 1292(b) of title 28 of the United States Code, to district courts to certify appeals of interlocutory orders to the courts of appeals. (J.A. 36). CNB then sought leave to appeal in the Second Circuit as provided by section 1292(b).[1] (J.A. 36). The court of appeals dismissed the petition for lack of jurisdiction under section 1292(b). The court held that its appellate jurisdiction of matters decided by the district court that originated in the bankruptcy court is limited to review of final decisions, judgments, orders and decrees of district courts as provided under section 158(d). *Germain v. Connecticut National Bank*, 926 F.2d 191 (2d Cir. 1991) (J.A. 34-47).

On May 16, 1991, CNB filed a petition for a writ of certiorari with this Court to review the decision of the court of appeals. The petition was granted on October 15, 1991.

SUMMARY OF THE ARGUMENT

In concluding that section 158(d) of title 28 of the United States Code created an exclusive scheme of bankruptcy appellate jurisdiction in the courts of appeals, and thereby impliedly repealed section 1292(b) of the same title, the Second Circuit did not give due credit to the plain language of section 1292(b).

[1] In addition to seeking leave to appeal pursuant to 28 U.S.C. § 1292(b), CNB also filed a notice of appeal claiming jurisdiction under the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The court of appeals dismissed that appeal on the ground that the third requirement of the collateral order doctrine, that the issue presented be effectively unreviewable on appeal from a final judgment, was not satisfied. *Germain v. Connecticut National Bank*, 930 F.2d 1038, 1040 (2d Cir. 1991).

Section 1292(b) permits the taking of interlocutory appeals in any civil action upon certification by the district court and with leave of the court of appeals. Neither statutory provision by its terms precludes the operation of the other; the giving of effect to both would render neither meaningless nor mere surplusage.

Furthermore, the enactment of section 158 carried with it none of the usual indicia, in language or in legislative history, to suggest that it was intended to create an exclusive scheme for the taking of appeals in bankruptcy matters, thereby repealing other previously applicable jurisdictional statutes. The Second Circuit's interpretation of the legislative history led it to conclude, with respect to bankruptcy matters originating in the bankruptcy court, that section 1292(b) was repealed by negative implication. In the absence of any express indication of congressional intent in the legislative history of section 158, the Second Circuit based its conclusion on the interplay between the House and the Senate and the silence in section 158(d) on the topic of interlocutory appeals. However, a repeal will be implied only when Congress has expressed its intent to override existing law both clearly and manifestly. Congressional intent cannot be found in interplay and silence. In this regard, it appears particularly inappropriate to infer an intent to repeal from the mere enactment of what the Second Circuit considered to be redundant language.

Further, the Second Circuit's willingness to infer that Congress intended to repeal sections 1291 and 1292 by the enactment of section 158 ignored the consequences of such a drastic change and the extent to which it affected other available avenues of review by the court of appeals, such as mandamus. Finally, subsequent legislation suggests that Congress did not intend to divest the courts of appeals of their power to hear interlocutory appeals in bankruptcy cases.

ARGUMENT

I. INTRODUCTION

As added in 1958, section 1292(b) of title 28 grants to the court of appeals the discretion to hear appeals of certain interlocutory orders. The power to entertain these appeals arises only after the district court has certified the issue as appropriate for immediate review. The availability of such an appeal, limited as it is, serves an important purpose in permitting those issues that may be dispositive or controlling to be considered by the court of appeals before resources are expended to bring the case to a final judgment.

Section 1292(b) jurisdiction is available in the present case. The plain language of the statute says so, and it had been so applied for over twenty years. When Congress enacted section 158 of title 28 of the United States Code, it expressed no intent to affect a major change in appellate jurisdiction over bankruptcy matters decided in the first instance by the bankruptcy court or to create different appellate schemes effecting bankruptcy cases depending on whether the matter originated in the bankruptcy court or the district court.

In concluding that section 158 was intended as an exclusive appellate scheme in bankruptcy cases originating in the bankruptcy courts and that it repealed by implication sections 1291 and 1292, the court below could not cite to any words in the statute or in the legislative history that supports such a change because none in fact exist. Consistent with accepted rules of statutory construction, CNB submits that, in determining Congress' intent in enacting section 158, the failure of Congress to state in the statute that it was revoking section 1292 in bankruptcy proceedings alone should be conclusive of the issue of its intention: if it had wanted to work such a revocation, it would have said so. The total silence of the Congress, in the legislative history as well as in the statute, leaves no ground to support the implied revocation of section 1292(b) by the enactment of section 158(d).

II. JURISDICTION OF BANKRUPTCY MATTERS

Original and exclusive jurisdiction over all cases under the Bankruptcy Code[2] lies in the district courts. 28 U.S.C. § 1334(a). The district courts possess original but not exclusive jurisdiction over all civil proceedings arising under, arising in or related to cases under the Code.[3] 28 U.S.C. § 1334(b). Pursuant to section 157(a) of title 28, the various district courts may provide that all bankruptcy cases be automatically referred to the bankruptcy courts for the district. Most, if not all, district courts have adopted an automatic reference. Appeals of final and interlocutory orders of bankruptcy courts are generally governed by section 158(a).

However, not all bankruptcy matters are heard by the bankruptcy court. The district court may withdraw the reference of a bankruptcy case, withdrawing either the entire case or simply a proceeding within a case. 28 U.S.C. § 157(d). When a district court withdraws the reference, the district court hears the matter sitting as a bankruptcy court. Appeals of decisions of district courts sitting as bankruptcy courts

[2] 11 U.S.C. §§ 101-1330 (1990).

[3] In general, proceedings "arising under" the Code include causes of action that exist pursuant to specific statutory provisions in the Code, such as preference actions. 1 W. Collier, *Collier on Bankruptcy*, ¶ 3.01[iii], 3-23 to 3-26 (15th ed. 1991). Proceedings "arising in" bankruptcy cases include administrative proceedings, such as objections to claims. *Id.* at ¶ 3.01[v], at 3-29. Both "arising in" and "arising under" proceedings are commonly referred to as "core" bankruptcy matters. *See* 28 U.S.C. § 157(b)(2). "Related to" or non-core proceedings include causes of action that are independent of the provisions of the Bankruptcy Code and arise apart from the administrative bankruptcy process, such as a pre-petition state law tort claim. *See id.* at ¶ 3.01[iv], at 3-26 to 3-28. *See also* 28 U.S.C. § 157(b)(3) (determination of core and non-core matters) and § 157 (c)(1) (treating bankruptcy judge's power to hear non-core matters).

in withdrawn matters are governed by sections 1291 and 1292 of title 28.[4]

The narrow issue submitted to this Court and on which the circuits are divided is whether an interlocutory order of a district court, sitting in review of a bankruptcy court, may be appealed to the court of appeals pursuant to section § 1292(b).

III. BASES OF THE CONFLICT BELOW

As noted by the Fourth Circuit, the courts of appeals are split on the issue of the applicability of section 1292(b) to interlocutory appeals of district court orders entered in review of a matter originating in the bankruptcy court. *Capital Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 751-52 (4th Cir. 1990). A majority of courts, including the court below, have held that section 158(d) exclusively governs court of appeals review of all district court orders entered in review of the orders of the bankruptcy court. A minority of courts have held the opposite, concluding that section 158(d) is not an exclusive jurisdictional provision and that other jurisdictional statutes, including section 1292(b), apply in the context of such bankruptcy appeals.

Courts upholding the majority view have justified their conclusion that section 158(d) is exclusive on several grounds.

[4] *Matter of Topco, Inc.*, 894 F.2d 727, 736, *reh'g en banc denied*, 902 F.2d 955 (5th Cir. 1990); *In re Benny*, 791 F.2d 712, 717-20 (9th Cir. 1986); *In re Salem Mortgage Co.*, 783 F.2d 626, 632 n.15 (6th Cir. 1986); *In re Amatex Corp.*, 755 F.2d 1034, 1038-39 & n.4 (3d Cir. 1985).

Some courts had suggested that 28 U.S.C. § 158(d) also governs court of appeals review of district court orders entered in bankruptcy cases where the district court enters an order sitting as a bankruptcy court in withdrawn matters. *See In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (relying heavily on *Teleport*). These cases, however, have been subsequently repudiated. *See Topco*, 894 F.2d at 736-37 (rejecting *Barrier*); *Benny*, 791 F.2d at 717-20 (rejecting *Teleport*).

Some courts within the majority have taken the view that section 158 is comprehensive, thereby implicitly excluding other jurisdictional provisions. *See, e.g., In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (finding that section 158(d) appears to be comprehensive); *In re International Horizons, Inc.*, 689 F.2d 996, 1000 n.6 (11th Cir. 1982) (finding section 1293, the predecessor to section 158(d), to be exclusive and comprehensive).

Other courts have inferred that section 158(d) must be exclusive on the basis that, had Congress intended interlocutory review to be available in the court of appeals, Congress would have said so in section 158(d) in the same or similar manner that it did in section 158(a). *See, e.g., Capitol Credit*, 912 F.2d at 752-53 (noting that although section 158(d) "says nothing about whether it is . . . exclusive . . . the structure of the section infers its limits"); *In re Brown*, 803 F.2d 120, 122 (3d Cir. 1986) (Congress' failure to address interlocutory orders in section 158(d) implies intention "to restrict the ability of parties . . . to appeal district court orders"); *Barrier*, 776 F.2d at 1299 (inferring intent to exclude interlocutory review from failure to provide for it in section 158(d)).

Still other courts, including the court below, have reasoned that section 158(d) must be the exclusive grant of jurisdiction to the courts of appeals; otherwise, when compared to section 1291 of title 28,[5] it would be superfluous. *See, e.g., Germain*, 926 F.2d at 197 (J.A. 46); *In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985) ("If § 1291 still applied to final bankruptcy orders, § 158 would be superfluous."); *In re Kaiser Steel Corp.*, 911 F.2d 380, 385 (10th Cir. 1990) ("Construing section 1291 to apply to orders entered under section 158(a) clearly renders section 158(d) superfluous . . . .").

In contrast, courts adopting the minority view have done so on the ground that a literal reading of section 1292(b) indi-

[5] This section grants to the court of appeals jurisdiction to hear appeals from final decisions of the district court.

cates that it applies in a case such as this and that nothing in the text of section 158(d) or its legislative history suggests that the continued application of section 1292(b) would violate any manifest legislative intent. *See, e.g., In re Official Committee*, 943 F.2d 752, 755 n.2 (7th Cir. 1991) (disagreeing with *Germain*); *In re Jartran, Inc.*, 886 F.2d 859, 865 (7th Cir. 1989); *Matter of American Reserve Corp.*, 840 F.2d 487, 488 (7th Cir. 1988); *In re Moens*, 800 F.2d 173, 177 (7th Cir. 1986). *See also In re Salem Mortgage Co.*, 783 F.2d 626, 632 (6th Cir. 1986) (sections 158 and 1291 are alternative jurisdictional provisions); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 199-200 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983) (sections 158, 1291, 1292 and 1651 apply concurrently).

It is not possible to reconcile the divergent views of the majority and minority on the question of what effect section 158(d) has upon the jurisdiction of the courts of appeals pursuant to section 1292(b). It is the minority position, however, that reflects Congress' intent as determined by the application of well-recognized rules of statutory construction.

IV. THE PROVISIONS OF 28 U.8.C. § 1292(b) ARE CLEARLY APPLICABLE.

The court of appeals has jurisdiction to consider CNB's appeal because, by its plain language, section 1292(b) applies to this case. The fact that the subsequently-enacted section 158 also governs some appeals in bankruptcy cases is no basis upon which to conclude that section 158(d) and section 1292(b) may not both be given effect. To hold, as the majority of circuits have, that section 158(d) in effect has repealed both section 1291 and section 1292 is an extreme approach to the interpretation of the statute.

A. The Plain Meaning of Section 1292(b) Compels Its Application.

In construing a statute, the Court's duty is to give meaning to the legislature's intent. *Caminetti v. United States*, 242

U.S. 470, 485 (1917). The starting point for this inquiry is the statute's language. *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When the statute's language is clear, the inquiry should end there. *Ron Pair*, 489 U.S. at 241; *United States v. Rutherford*, 442 U.S. 544, 551 (1979).

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

Caminetti, 242 U.S. at 485. *See also United States v. Locke*, 471 U.S. 84, 95 (1985). This is especially so when it is the subject matter jurisdiction of the courts which is being considered. *See United States v. American Bell Tele.*, 159 U.S. 548, 549-50, 554 (1895) ("Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction . . .").

Section 1292(b) plainly provides for discretionary appeals of certain interlocutory orders of the district courts to the courts of appeals. Applying this statute to the instant case, it is clear that its requirements have been satisfied. The district court's order affirming the order of the bankruptcy court is an "order" of a "district judge" made in "a civil action . . . not otherwise appealable" under section 1292. 28 U.S.C. § 1292(b).[6] Furthermore, the district court certified its order as one involving a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. (J.A. 33). Thereafter, CNB timely filed a petition for leave to appeal with the

[6] *See Thomason v. Thomason*, 274 F. 2d 89, 90-91 (D.C. Cir. 1959) ("civil actions" include all equitable and legal actions). *See also* Fed. R. App. P. 6 advisory committee's note.

court of appeals. (J.A. 12). The district court's order thus falls within the boundaries of the jurisdictional grant contained in section 1292(b).

"The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *Ron Pair*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). *See also Demarest v. Manspeaker*, ___ U.S. ___, 111 S. Ct. 599, 604 (1991); *Rubin v. United States*, 449 U.S. 424, 430 (1981). A plain reading of section 1292(b) compels its application in this case. There is nothing in the words of the statute or its purpose[7] which suggests a legislative intent to prevent the application of section 1292(b) in bankruptcy appeals. There is similarly no indication that application of section 1292(b) in this case would violate any of the enactment's underlying policies.[8] Indeed, application of section 1292(b) in the context of this case is consistent with the statute's stated and implicit goals. In fact, interlocutory review under section 1292(b) had long been permitted under pre-1978 bankruptcy law.[9] The plain, textual requirements of section 1292(b) have been satisfied in this case. The court below possessed the power to entertain the petition for leave to appeal.

[7] *See* S. Rep. No. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 5255 (discussing the purpose of section 1292(b)).

[8] The policy promoted by section 1292(b) is simple and straightforward: where an immediate appeal of an interlocutory order offers the opportunity to resolve the litigation efficiently, the court of appeals, in its discretion, may hear it. *Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981).

. This policy is consistent with the bankruptcy policy of cost-efficient and cost-effective administration of bankruptcy matters. *See Katchen v. Landy*, 382 U.S. 323, 328-29 (1966).

[9] One court has succinctly summarized the prior law:

> Under the former bankruptcy act, certain interlocutory orders were appealable to the court of appeals under 11 U.S.C.
>
> *(continued)*

B. Nothing in Section 158 Prevents the Application of Section 1292.

Pursuant to section 158(a), final and interlocutory orders of a bankruptcy court are initially appealable to the district court.[10] In addition, finals orders appealed pursuant to section 158(a) are further appealable to the court of appeals pursuant to section 158(d). In this regard, section 158(d) is similar to section 1291, which also provides for court of appeals jurisdiction over the final orders of the district court. However, neither section 158(d) nor section 1291 addresses in any manner the jurisdiction of the court of appeals over an interlocutory appeal from a district court order entered pursuant to section 158(a): they are both silent on the subject.

As this Court has stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and

[9] *(continued)*

> § 47(a) (1976). Under that section, orders in 'proceedings in bankruptcy' were appealable whether they were interlocutory or final. Orders in 'controversies arising in proceedings in bankruptcy,' on the other hand, were appealable only if they were final *or were certified under section 1292(b). See generally* 16 C. Wright, A. Miller, E. Cooper & E. Grossman [sic], *Federal Practice and Procedure* § 3926, at 103-04 & n. 13 (1977).

John E. Burns Drilling v. Central Bank of Denver, 739 F.2d 1489, 1491 n.5 (10th Cir. 1984) (emphasis added).

See also Scholz v. United States, 773 F.2d 709, 710 (6th Cir. 1985) (permitting interlocutory appeal of district court order reversing bankruptcy court order under 11 U.S.C. § 47(a)); *Citron Inv. Corp. v. Emrich*, 493 F.2d 561, 562 (9th Cir. 1974) (applying section 1292(b), court of appeals accepted an interlocutory appeal of a district court order affirming a bankruptcy referee's order); *McAvoy v. United States*, 178 F.2d 353, 355 (2d Cir. 1949) (finding jurisdiction under section 1292 to review affirmance by district court of injunction issued by bankruptcy referee).

[10] Alternatively, under section 158(b), appeals of final orders and, with leave, interlocutory orders of a bankruptcy court may be taken to a bankruptcy appellate panel consisting of an appellate tribunal of three bankruptcy judges in any circuit where such a panel has been created. 28 U.S.C. § 158(b).

when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This preference for giving full effect to congressional enactments wherever possible is well established. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes should each be given effect where possible); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("[W]hen there are two acts upon the same subject the rule is to give effect to both if possible.").

The issue in this case involves the application of section 1292 in the bankruptcy context and raises the question of whether such application creates an irreconcilable conflict with section 158(d) such that the two cannot coexist. Some courts have made much of the silence of section 158(d) with regard to interlocutory matters by contrasting it with the provisions of section 158(a). Whereas subsection (a) provides for district court review of the final and interlocutory orders of bankruptcy courts, subsection (d) only refers to court of appeals review of final orders. As noted previously, these courts have inferred from this silence that Congress thereby intended to supersede sections 1291 and 1292.[11] However, "[c]ongressional silence, no matter how 'clanging,' cannot override the words of a statute." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.13 (1985).[12] *Accord Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

The silence in section 158(d) on the issue of interlocutory appeals is not a sound basis from which to infer that sections 158(d) and 1292 cannot coexist. To the contrary, the silence

[11] *See supra* page 7.

[12] This Court has frequently noted that, if Congress intends a result, it knows how to express it. *See, e.g., Toibb v. Radloff*, ___ U.S. ___, 111 S. Ct. 2197, 2204 (1991); *Mallard*, 490 U.S. at 303; *Russello v. United States*, 464 U.S. 16, 23 (1983). For example, Congress has chosen to expressly limit section 1292 jurisdiction in certain bankruptcy situations not pertinent here. See *infra* § VI.

permits both to be given effect. There is nothing in the language of section 158(d) that negates jurisdiction under section 1292(b) or creates an irreconcilable conflict with section 1292(b). Thus, application of section 1292(b) should continue in the absence of a clearly stated congressional expression to the contrary. *See Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912) (" 'It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' "); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (party contending Congress changed settled law has burden of showing intent). There is no such expression in section 158. Accordingly, this Court should conclude that both provisions are effective.

C. Application of Section 1292(b) Would Not Render Section 158(d) "Superfluous."

Some courts have rested the conclusion that section 158(d) precludes application of section 1292(b) in part on the ground that application of section 1291 would render section 158(d) "superfluous." *See, e.g., Germain*, 926 F.2d at 197 (J.A. 46). The courts that have concluded that concurrent application of section 158(d) and other jurisdictional provisions would render section 158(d) "superfluous" have done so on the basis of implicit reasoning. *See, e.g., Germain*, 926 F.2d at 194 ("The fact that [section 158(d)] would appear to be superfluous if not our exclusive source of our jurisdiction does, however, imply that it is exclusive.") (J.A. 40-41).

This reasoning contains several progressions. First, rather than conduct a direct comparison of sections 158(d) and 1292, the courts base their "superfluous" finding on a comparison of sections 158(d) and 1291. *See, e.g., Germain*, 926 F.2d at 194 (J.A. 46-47); *In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985). Recognizing that both sections 1291 and 158(d) provide for final order jurisdiction in the court of appeals, several courts have indicated that application of both provisions

appears to create something of a redundancy. *See, e.g., Teleport Oil*, 759 F.2d at 1378; *In re Kaiser Steel Corp.*, 911 F.2d 380, 385 (10th Cir. 1990). Second, these courts imply that this redundancy is repugnant to enforcing both statutes, thus creating an irreconcilable conflict. *See, e.g., Germain*, 926 F.2d at 197 (J.A. 46-47). To resolve this implicit conflict, these courts conclude that section 158(d) precludes application of section 1291 in the bankruptcy context. *Barrier*, 776 F.2d at 1299; *Teleport Oil*, 759 F.2d at 1378. Lastly, these courts infer that this preclusive effect also extends to section 1292(b). *See, e.g., Barrier*, 776 F.2d at 1299 (holding that section 158(d) "clearly supersedes 28 U.S.C. § 1291 . . . and would inferentially appear to supersede section 1292 as well").

Any apparent redundancy between sections 1291 and 158(d) does not render the two sections repugnant. They simply do not conflict. Rather, they both address the same subject in essentially the same way, *i.e.*, they both provide for identical final order jurisdiction. Lacking here is the kind of irreconcilable conflict necessary to support the conclusion that one provision overturns the other. *See Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198. As this Court has stated, in the context of defining when one statute may implicitly repeal another, "it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary." *Wood v. United States*, 41 U.S. (16 Pet.) 341, 362 (1842), *quoted in Borden*, 308 U.S. at 198. In this context, this Court has required that there be a "positive repugnancy" in order to support a finding that one act supersedes another. *Wood*, 41 U.S. at 362. Neither statute is offensive to the other and, because both are easily reconciled through concurrent application, effect should be given to both provisions. *See Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198.

Furthermore, this comparative analysis of sections 158(d) and 1291 does not demonstrate that application of section 1291 would render section 158(d) "entirely without meaning" as that phrase has been used by this Court. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987).[13] Although they may overlap, each provides an additional jurisdictional grant that the other does not. Section 158(d), in addition to permitting appeals from the district court to the court of appeals in bankruptcy matters, makes provision for appeals from the bankruptcy appellate panel to the court of appeals, a grant found in neither section 1291 nor section 1292.[14] Similarly, section 1291, in addition to permitting appeals from the district court to the court of appeals in bankruptcy matters, addresses all other appeals from final decisions of the district court in the myriad range of cases that court may hear. Section 158(d) does not similarly provide this jurisdictional authority as it is limited by its terms solely to bankruptcy matters.[15]

---

[13] The Second Circuit described its reluctance to violate the canon of statutory construction "disfavoring interpretations that render statutory language superfluous." *Germain*, 926 F.2d at 197 (J.A. 46). Although there exists a recognized precept that it is a court's duty "to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) *quoted in Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 103 (1989), this rule does not pertain to the question before this court. Here, CNB asks that every word in all of the relevant provisions be given effect.

Perhaps the Second Circuit was concerned not with surplus language within one of these statutory provisions, but rather its belief that giving effect to section 1291 would render section 158 meaningless. As discussed above, that situation does not present itself here. *See Crawford*, 482 U.S. at 441-42.

[14] The text of section 158(d) (although then denominated section 1293) was drafted at the same time that the bankruptcy appellate panels were being conceived. Therefore, what became section 158(d) was necessary to provide the appellate process for appeals from appellate panels to the courts of appeals. *See infra* pages 24 to 25.

Further, the language found in section 158(a) was not enacted as part of section 1293: it was originally enacted as a part of 28 U.S.C. § 1482 and as an amendment to 28 U.S.C. § 1334(b) *See infra* pages 24 to 25.

[15] It bears noting that, whereas section 1291 provides generally for final order jurisdiction in the courts of appeals, section 158(d) concerns only final order jurisdiction in the bankruptcy context. As this Court has long

(continued)

Undeniably, no matter what the outcome of this appeal, both section 158(d) and section 1291 will remain as viable statutory provisions. Thus, this is not the situation addressed by this Court in *Crawford* where a broad reading of one provision would totally nullify the existence of another. 482 U.S. at 441-42 (if Fed. R. Civ. P. 54(d) is interpreted to permit discretion over all types of costs, then list of items appearing in 28 U.S.C. § 1920 would "serve[ ] no role whatsoever"). Rather, this is a case where two enactments, section 158(d) and section 1291, are both compatible and consistent and, in addition, each serves a role.

Of course, this discussion of the interrelationship of sections 158 and 1291 ignores a point of significance to this appeal. CNB did not invoke the jurisdictional grant of section 1291; it obtained certification to petition for leave to appeal pursuant to section 1292. The existence of any apparent redundancy in sections 1291 and 158(d) in no way establishes a like redundancy in sections 158(d) and 1292 because, unlike section 1291, section 1292 addresses interlocutory rather than final appeals. It cannot be said that a straightforward comparison of section 158(d) and section 1292 reveals a conflict or that their concomitant application would leave behind any surplus language. It is only through the majority's multi-stepped reasoning based on a comparison of sections 158 and 1291 that one then reaches the result that sections 158 and 1292 cannot coexist. Nothing in section 158, however, compels this result.

[15] *(continued)*

held, unless the provisions of a statute of general applicability irreconcilably conflict with the provisions of a more specific enactment, both must be given effect. *See Mancari*, 417 U.S. at 550-51. Where, as here, the general provision is not at odds with the specific, both should be regarded as effective.

D. Section 158 Does Not Embody the Entire Bankruptcy Appellate Scheme and Is Therefore Not Comprehensive.

A number of courts justify the conclusion that section 158(d) is exclusive on the grounds that it appears to be comprehensive. Grants of jurisdiction, however, are not normally exclusive. *See In re Salem Mortgage Co.*, 783 F.2d 626, 632 n.15 (6th Cir. 1986) (noting that "for example, the grant of federal question jurisdiction in 28 U.S.C. § 1331 is not exclusive of other jurisdictional bases"). *See also Continental Grain Co. v. Federal Barge Lines Inc.*, 268 F.2d 240, 241 (5th Cir. 1959), *aff'd*, 364 U.S. 19 (1960) (applying section 1292(b) in an admiralty suit prior to the merger of admiralty and civil actions). Where, as here, there is nothing in section 158 to suggest that Congress intended it to be exclusive of other jurisdictional grants, this Court should conclude that both are applicable.

Furthermore, these courts have not treated section 158(d) as comprehensive. For example, they have recognized that appeals of final and interlocutory district court orders in withdrawn bankruptcy cases are governed by sections 1291 and 1292.[16] In addition, these courts have found that § 158(d) is not so comprehensive as to exclude jurisdiction under section 110 of title 29 or section 1651 of title 28 in appropriate instances. *See, e.g., Elsinore Shore Assoc. v. Local 54, Hotel Employees*, 820 F.2d 62, 65-67 (3d Cir. 1987) (permitting direct review in the court of appeals pursuant to 29 U.S.C. § 110 of an injunction issued by a bankruptcy judge involving a labor dispute); *Salem Mortgage*, 783 F.2d at 632 n.15 (6th Cir. 1986); *In re Benny*, 791 F.2d 712, 717 (9th Cir. 1986) (noting that the majority of the circuits do not treat section 158(d) "as the sole source of jurisdiction over bankruptcy appeals"); *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (after concluding that section 158(d) excludes section 1292, court granted writ of mandamus without treating question of whether exclusivity

[16] *See supra* pages 5-6 (discussing appeals in withdrawn bankruptcy matters).

of section 158(d) extended to the All Writs Act); *In re Teleport Oil*, 759 F.2d at 1368 (9th Cir. 1985) (finding mandamus available).[17] Thus, actual appellate practice belies any claim that section 158(d) is somehow comprehensive.

The argument that Congress intended to create a comprehensive appellate scheme within the confines of section 158 seems particularly suspect when made by some of the same courts who acknowledge that section 158 is not so comprehensive as to cover appeals to the court of appeals from the district court when the district court is acting as a bankruptcy court, or to preclude review by the court of appeals of district court decisions of interlocutory orders of the bankruptcy court pursuant to section 1651 of title 28. This concession, together with the presumption against an exclusive grant of jurisdiction, suggest the conclusion that section 158 was not meant to be comprehensive.

V. ENACTMENT OF SECTION 158(d) DID NOT IMPLIEDLY REPEAL SECTION 1292(b) IN BANKRUPTCY CASES.

A cardinal rule of statutory construction that has often been repeated by this Court dictates that repeals by implication are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). *Accord Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). The party urging an implied repeal has a heavy

[17] Although dicta, the Seventh Circuit observed that the failure of section 158 to mention interlocutory appeals may have been mere oversight rather than a deliberate decision. Similarly, it expressed the belief that the legislative history did not support an inference that the appellate remedies of section 158(d) were intended to be exclusive. *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984).

burden in establishing this "clear and manifest" intent. *Amell v. United States*, 384 U.S. 158, 165-66 (1966). *See also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (repeal by implication will not be lightly inferred).

A. The Circumstances Justifying Repeal by Implication Are Not Present Here.

As this Court has identified, repeal by implication may be tolerated in two specific, well-settled situations:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas, 296 U.S. at 503. Neither situation is present here.

Irreconcilability has been found only where it is "impossible" to give effect to both statutes. *See Wilmot v. Mudge*, 103 U.S. 217, 221 (1880). *Accord TVA v. Hill*, 437 U.S. 153, 190 (1978); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57, *reh'g denied*, 324 U.S. 890 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way . . . ."); *Borden*, 308 U.S. at 198-99.

As discussed above, sections 1292(b) and 158(d) are reconcilable. Indeed, the provisions are complementary. In this case, application of one in no way renders application of the other "impossible." Similarly, section 1291 and section 158(d) do not conflict: they both provide the same appellate procedure for the same situation. It would be "the ultimate in implication" to infer a repeal of section 1291 or section 1292 by enactment of section 158(d): they simply do not give rise to any conflict. *See Crawford Fitting*, 482 U.S. at 442.

With regard to the second *Posadas* category, section 158 does not address the subject of interlocutory appeals and, as noted above, nothing in its silence on the issue should be taken as precluding review under section 1292(b). *See Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 496 n.13 (1985). *Accord Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)) ("Ordinarily, 'Congress' silence is just that – silence.' ").

Nor can it be said that section 158(d) was meant as a substitute for section 1291. Section 1291 encompasses the broad grant of final appellate jurisdiction in the courts of appeals, while section 158(d) is limited to appeals of final orders of the district courts or bankruptcy appellate panels involving matters on appeal to them from the bankruptcy courts. Thus, section 158(d) cannot be viewed as a substitute for section 1291, and certainly not for section 1292. Accordingly, the rare situations that may sometimes justify repeal by implication are not present in this instance. *See, e.g., TVA*, 437 U.S. at 187 n.33. *Accord Rubin v. United States*, 449 U.S. 424, 430 (1981).

B. The Legislative History of Section 158(d) Does Not Reveal a Clear and Manifest Intent to Repeal Section 1292.

Even if one of the *Posadas* situations were present, repeal by implication is not appropriate unless the legislature intended such a result and its intent is "clear and manifest." *Posadas*, 296 U.S. at 503. *See also Rodriguez*, 480 U.S. at 524; *Aaron v. S.E.C.*, 446 U.S. 680, 697 (1980) (requiring a "clear" expression of congressional intent to override plain meaning of statute); *Borden*, 308 U.S. at 198; *Red Rock*, 106 U.S. at 601-02. The burden of establishing this "clear and manifest" intent of Congress to repeal section 1292 by the enactment of section 158 cannot be met here.

Although the court below acknowledged that section 158 did not by its express terms repeal section 1292 in bankruptcy cases, it concluded that it did so impliedly. *Germain*, 926 F.2d

at 197 (J.A. 46-47). Overcoming the canon of construction disfavoring such implicit repeals, the Second Circuit claimed to have found the requisite "clear and manifest intent" in the legislative history of section 158(d). *Id.* The court then concluded that "Congress made a deliberate and informed policy decision" to eliminate the jurisdiction of the court of appeals over interlocutory bankruptcy decisions arising from the district court. *Id.*

An examination of the legislative materials reveals an absence of discussion or deliberation regarding interlocutory review in general and any intent to repeal section 1292(b) in particular. Indeed, when it reviewed the legislative history of section 158(d), the Third Circuit noted that "for all practical purposes there is no legislative history for the section." *Coastal Steel*, 709 F.2d at 200 n.7. *Accord Moens*, 800 F.2d at 177.

Enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA),[18] section 158(d) was added largely as a recodification of 28 U.S.C. § 1293(b).[19] Particularly noteworthy is the fact that the issue of appeals of

[18] Pub. L. No. 98-353, § 104, 98 Stat. 333 (1984). The legislative history to BAFJA is extremely limited. *See* H.R. Conf. Rep. No. 882, 98th Cong., 2d. Sess., (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 576 (providing no discussion of section 158(d)).

[19] Because of their similarity, the legislative history of section 1293 has been looked to by courts in their attempts to determine the congressional intent behind section 158(d). *See Germain*, 926 F.2d at 194 (J.A. 41) (finding provisions to be substantially the same); *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1395 n.4 (5th Cir. 1987) (sections 158(d) and 1293 "are to be interpreted similarly because, except as noted below, there is no substantive difference between them"); *Riggsby*, 745 F.2d at 1154-55 (noting that the provisions of the two "appear to be identical"). Accordingly, when discussing the legislative history of section 158(d), it is the history of section 1293 which is being considered. *See Coastal Steel*, 709 F.2d at 200 n.7.

Section 158 is, in fact, a conglomeration of several other statutory provisions first passed by Congress as part of the Bankruptcy Reform Act

(continued)

interlocutory decisions from the district court to the court of appeals is never mentioned in this history and the subject of appeals of final decisions from the district court was not mentioned until the last amendment to section 1293. *See* 124 Cong. Rec. 33,991 (Oct. 5, 1978). In addition, section 1293 pertained only to appeals of final orders. The reference to interlocutory appeals that eventually became section 158(a) was not a part of section 1293; it was proposed by the House and enacted by the Senate in other sections of the bill. 28 U.S.C. §§ 1334(b) and 1482(b). *See* 124 Cong. Rec. 32,385 (Sept. 28, 1978) (reciting text of proposed statutes).

From this, one can observe that the focus of the amendment being proposed by the House and the Senate in section 1293 did not concern interlocutory jurisdiction of the court of appeals over district court decisions. *See id.* (district court orders are not mentioned in initial version of section 1293). Rather, the focus was on appeals to the court of appeals directly from decisions arising from the bankruptcy court and from the new bankruptcy appellate panels. *Id.* This history or, more properly, the lack thereof, regarding the creation of a new jurisdictional provision for appeals of final decisions, does not support a finding of clear and manifest intent to repeal *sub silentio* another jurisdictional statute.

[19] *(continued)*

of 1978 (Reform Act). *See* 28 U.S.C. §§ 1334, 1293 and 1482 (repealed). Subsection (a) of 158 originated from 28 U.S.C. §§ 1334(a) and (b) and § 1408. Subsection (b) of 158 was comprised of former sections 160 and 1482 of title 28. Subsection 158(d) contained the provisions previously in 28 U.S.C. § 1293. *See In re General Coffee Corp.*, 758 F.2d 1406, 1408 (11th Cir. 1985).

1. Legislative History Concerning the Enactment of Section 1293

In preparation for what ultimately became the Bankruptcy Reform Act of 1978,[20] the House passed a bill which would have created a new bankruptcy court system presided over by Article III bankruptcy judges. H.R. 8200, 95th Cong., 2d Sess., §§ 237-39, 124 Cong. Rec. 1804 (Feb. 1, 1978). As part of this system, a direct appeal would lie from the bankruptcy court to the court of appeals and sections 1291 and 1292 were proposed to be amended to so provide. *Id.* at 1786 (reciting proposed amendments to sections 1291 and 1292). The Senate, however, preferred not to grant Article III powers to bankruptcy judges. *See* 124 Cong. Rec. 32,391 (Sept. 28, 1978) (discussing differences between House and Senate proposals). Instead it provided that bankruptcy judges be subordinate to the district court in much the same manner as federal magistrates and called for appeals from the bankruptcy court to the district court. S. Rep. No. 989, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5804.

Despite the significant differences in the two drafts, no conference was held between the two houses. *See Germain*, 926 F.2d at 196 (J.A. 42). Instead, the House eventually adopted the Senate's proposal in its entirety, but with additional amendments. 124 Cong. Rec. 32,420 (Sept. 28, 1978). *See*

[20] Pub. L. No. 95-598, 92 Stat. 2549. The legislative history of the 1978 Act consists of two congressional reports, both of which were written prior to the introduction of section 1293 in the House, and the various congressional debates, none of which provide evidence of any intent to repeal section 1292(b) in the bankruptcy appellate context. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 18 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5963; H. Rep. No. 595, 95th Cong., 2d Sess., (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787; 124 Cong. Rec. 32,391 (Sept. 28, 1978) (discussing differences in House and Senate proposals); 124 Cong. Rec. 32,410 (Sept. 28, 1978) (providing description of appellate provisions); 124 Cong. Rec. 32,385 (Sept. 28, 1978) (providing text of initial version of section 1293); 124 Cong. Rec. 33,991 (Oct. 5, 1978) (Senate's amendments to section 1293).

also id. at 32, 350-32, 391 (setting forth House amendments to Senate version of bill). Because the House dropped its recommendation that the bankruptcy courts be presided over by Article III judges, there was no longer any need to amend sections 1291 and 1292 to provide for appeals from this new Article III court to the circuit court. However, the House did recognize that additional jurisdictional provisions were necessary. To provide for appeals to the court of appeals from final decisions of the new bankruptcy appellate panels created by the Act and from final decisions directly from the bankruptcy court, if both sides consented,[21] the House adopted section 1293 of title 28. *See* 124 Cong. Rec. 32,385 (Sept. 28, 1978) (setting out text of section 1293).

As originally drafted by the House, section 1293 provided:

> (a) the courts of appeal shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.
>
> (b) notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

124 Cong. Rec. 32,385. In addition, another House amendment added section 1482 to title 28. *Id.* This section provided for appeals to the new bankruptcy panels from final decisions of the bankruptcy court (section 1482(a)), and from interlocutory decisions of the bankruptcy court, if leave was granted by the appellate panel (section 1482(b)).[22] A different amendment, to section 1334(a) and (b) of title 28, mirrored these provisions for final and interlocutory appeals from the bankruptcy court to the district court.[23] The creation of sections 1293 and 1482 and the amendment of section 1334 served to complete and complement the existing jurisdictional scheme provided for in sections 1291 and 1292.

[21] This second provision, unlike the others, did not ultimately find its way into section 158 and thus did not survive BAFJA. *See In re General Coffee Corp.*, 758 F.2d 1406, 1408 (11th Cir. 1985).

[22] 124 Cong. Rec. at 32,386 (Sept. 28, 1978).

The Senate adopted all of the House amendments to the jurisdictional provisions of H.R. 8200, except that it amended the initial House version of section 1293. 124 Cong. Rec. 34,019 (Oct. 5, 1978). The Senate's amended version of section 1293 was as follows:

> (a) The court of appeals shall have jurisdiction of appeals from all final decisions of panels designated under Section 160(a) of this title.
>
> (b) notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal *from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or* from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

124 Cong. Rec. 33,991 (Oct. 5, 1978) (amending language emphasized). The House then adopted the Senate's amendments in full. 124 Cong. Rec. 34,145 (Oct. 6, 1978).[24] The Senate's October 5 changes to section 1293 thus became its permanent language. *See* Pub. L. No. 95-598, 92 Stat. 2667 (1978).

This insertion of language in section 1293(b) by the Senate provides the basis for the Second Circuit's conclusion that section 1293 (now section 158(d)) was intended to provide the

[23] *Id.* at 32,385.

[24] The Senate's amendments are recited in the House record. 124 Cong. Rec. 34,143-34,144 (Oct. 6, 1978).

exclusive ground for jurisdiction of appeals to the court of appeals from the district court. However, there was no explanation by the Senate of its last minute effort to address court of appeals jurisdiction over district court appeals, a subject which had not been addressed by either the House or the Senate. Further, there was no deliberation between the Senate and House, in a conference report for example, which would have articulated a mutual intent to divest the court of appeals of jurisdiction or to create different appellate schemes for matters originating in the bankruptcy court as opposed to the district court. Finally, there was simply nothing about this "eleventh hour"[25] entry that concerned the issue of permitting or restricting interlocutory appeals from the district court to the court of appeals that would indicate Congress intended to oust the court of appeals from this established jurisdictional territory.

2. "Interplay" of Congressional Action is No Source of Congressional Intent.

It is noteworthy that the Second Circuit did not rely on any specific comment made in a report or by any member of either the House or the Senate regarding the intended repeal of section 1292. Whereas references to legislative history most often entail proffers of affirmative statements of legislators, which statements can be interpreted to support the claimed congressional intent,[26] this is a case where the Second Circuit had no such helpful source from which to determine intent.[27] The application or non-application of section 1292 to

[25] *Maiorino v. Branford Sav. Bank*, 691 F.2d 89, 92 (2d Cir. 1982).

[26] *See, e.g., Continental Can v. Chicago Truck Drivers*, 916 F.2d 1154, 1156-57 (7th Cir. 1990); *United States v. South Half of Lot 7 & Lot 8 Block 14*, 910 F.2d 488, 489-90 (8th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1389 (1991).

[27] Not everything which is offered as "legislative history" is accorded equal consideration by this Court when it endeavors to search for congressional *(continued)*

the appeal of an interlocutory decision of the district court to the court of appeals was simply not addressed. The Second Circuit was thus left to seek the legislative intent of the last minute addition to section 158(d) not from commentary on the floor of either chamber,[28] or a House or Senate report, or even a conference report, but rather from the complex and somewhat tortured path the legislation took as it was passed between the chambers.

The Second Circuit relied on the House's abandonment of its proposed amendments to sections 1291 and 1292 as an action that indicated that the House was somehow conceding that the court of appeals would not hear appeals of bankruptcy matters. *Germain*, 926 F.2d at 196 (J.A. 44). Placed in context, however, the deletion of the proposed amendments to sections 1291 and 1292, coupled with the creation of a new

[27] *(continued)*

intent. For example, in *Kelly v. Robinson*, 479 U.S. 36 (1986), this Court noted that the appearance of comments favorable to the petitioner's interpretation during the hearings and in a commission report were not worthy of attention. "[N]one of those statements was made by a member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements." *Id.* at 51 n.13. *Accord Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., concurring) ("we are a Government of laws not of committee reports"); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) (statements made by bill's opponents not relevant); *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) (subsequent House Committee report rejected as authoritative on intent); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931) (statements made to committees or on floor by non-sponsoring Senators not of import).

[28] The only congressional mention of the appellate procedure contained in section 1293 was made in the House by Congressman Edwards when he introduced the amendments that adopted the Senate's version of the new Bankruptcy scheme and proposed the creation of section 1293. 124 Cong. Rec. 32,410 (Sept. 28, 1978). His statement is merely descriptive of the originally proposed appellate scheme. It sheds no light on the final version of section 1293 because it was issued before the pertinent Senate amendment was made and did not address interlocutory appeals from the district courts to the circuit courts.

companion section 1293, indicates that the House had abandoned its Article III approach and was, instead, creating an appellate jurisdiction scheme within title 28, which scheme addressed appeals to the court of appeals from each of the three bankruptcy forums: the district court, sections 1291 and 1292; the appellate bankruptcy panel, section 1293(a) and (b); and the bankruptcy court itself, section 1293(b).[29]

Furthermore, any "interplay" between the House and Senate, *Germain*, 926 F.2d at 195-96 (J.A. 44), took place before the Senate amended section 1293 to include appeals from the district court to the court of appeals. Therefore, that interaction cannot provide a foundation of intent, even if this Court were to determine that such interplay is an appropriate basis for determining legislative intent. However, as noted by this Court, " 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 60 (1947)). *Accord Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

Similarly, the insertion of the additional language in section 1293 at the last minute by the Senate, coupled with the failure to add language concerning interlocutory appeals, cannot fairly be categorized as a case of "actions speaking louder than words." *Germain*, 926 F.2d at 196 (J.A. 44). The language in question was added to a section that addressed final order appeals only. It is thus not telling that the added language dealt only with final order appeals. Further, the insertion of language can exhibit only an intent to include the language and no more. *See Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, ___ U.S. ___, 111 S. Ct. 1156, 1163 (1991). The mere addition of that final phrase to section 1293(b), "without giving a hint whatsoever [as to] its purpose,"[30] cannot support an intent to repeal by implication a separate, complementary and consistent statute on a different subject.

In essence, the court below inferred legislative intent from the interplay of the Congress and from the last minute insertion of additional language in section 1293 by the Senate. The drawing of inferences from such activity, as opposed to the interpretation of noteworthy commentary, fails to satisfy the "clear and manifest intent" standard espoused by this Court. *E.g., Rodriguez*, 480 U.S. at 524.[31] Certainly, any inference drawn from this activity would not establish a clear and manifest legislative intent to abrogate the jurisdiction of the court of appeals over interlocutory orders of the district court sitting in review of the bankruptcy court. *See Aaron*, 446 U.S. at 699.

The final version of section 1293 was hardly a model of clarity. *See, e.g., Capitol Credit Plan of Tennessee, Inc. v. Shaffer*, 912 F.2d 749, 750-51 (4th Cir. 1990) (code "does not lay out a clear appellate scheme in bankruptcy cases"); *In Re Comer*, 716 F.2d 168, 173 n.9 (3rd Cir. 1983) (referring to provision as "nearly incomprehensible"); *Coastal Steel*, 709 F.2d at 200 n.7; 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3926, at 38-43 (Supp. 1983) (also concluding that appeal provisions of 1978 Bankruptcy Reform Act were "nearly incomprehensible"). For example, the provision added by the Senate was not only somewhat repetitive in light of section 1291, it was also internally redundant.

[29] *See supra* pages 24 to 25.

[30] *Tidewater Oil Co. v. United States*, 409 U.S. 151, 168 n.41 (1972). When faced with the question of whether the creation of a method of appealing interlocutory decisions to the court of appeals was meant to supplant the original jurisdiction granted explicitly to the Supreme Court in 1903, the Court in *Tidewater* refused to find such a repeal by implication in Congress' silence. *Id.* at 159.

[31] If "passing references" to the intended purpose of a piece of legislation are insufficient to meet the "clear and manifest" burden, *Rodriguez*, 480 U.S. at 525, surely silent interplay must likewise be. *See Mancari*, 417 U.S. at 549.

The Senate added language to subsection (b) of section 1293 to allow appeals from the bankruptcy appellate panels.[32] However, such appellate jurisdiction had already been provided for by the House in section 1293(a).[33] Thus, both subsections of section 1293 provided for an identical jurisdictional grant.

To ignore the plain language of a statute requires a clear expression in the legislative history of congressional intent. Where, as here, the statutes can be reconciled, the absence of some affirmative showing of an intention to repeal will defeat a claimed repeal by implication. *See Mancari*, 417 U.S. at 550. The final amendments made by the Senate that added § 158(d) are far too curious and muddled to be said to exhibit a "clear and manifest" intent to bring about the implicit repeal of the long-standing application of section 1292 to bankruptcy

[32] *See supra* page 25.

[33] This internal redundancy was eliminated when the substance of section 1293 was transferred to § 158(d) by the enactment in 1984 of section 104 of BAFJA. 98 Stat. 341. *Compare* 28 U.S.C. § 158(d) *with* Pub. L. No. 95-598, § 236, 92 Stat. 2667 (1978) (text of section 1293). As a part of BAFJA, Congress amended the effective date of section 1293 by replacing "shall take effect on June 28, 1984" with "shall not take effect." BAFJA, § 113, 98 Stat. 343, amending § 402(b) of the Reform Act. Section 402(b) of the Reform Act provided the effective dates for Title II of the Act. Title II contained the amendments to Title 28, including the proposed § 1293. 92 Stat. 266.

Curiously, section 121(a) of BAFJA also purported to amend section 402(b) by striking "June 28, 1984" and replacing it with "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984." 98 Stat. 345. Thus, competing amendments exist, one repealing section 1293 by providing that it would never take effect and the other apparently enacting it along with the other provisions of BAFJA. The interpretation that section 1293 survived BAFJA, however, has been rejected. *See Hubbard v. Fleet Mortgage Corp.*, 810 F.2d 778, 780 n. 3 (8th Cir. 1987) (finding that Congress intended to repeal section 1293); *In re General Coffee Corp.*, 758 F.2d 1406, 1408 (11th Cir. 1985) (finding section 1293 to have been repealed, and quoting remarks of Senator Dole explaining inconsistency as a mistake); *In re Amatex Corp.*, 755 F.2d 1034, 1036-37 (3d Cir. 1985) (finding section 1293 repealed); *Riggsby*, 745 F.2d at 1155 (same).

matters. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *TVA v. Hill*, 437 U.S. 153, 192 (1978); *see also Ex Parte Collett*, 337 U.S. 55, 61 (1949) ("the plain words and meaning of a statute cannot be overcome by a legislative history [that] . . . may furnish dubious bases for inference in every direction"); *Wisconsin R.R. Comm'n v. Chicago Burlington & Quincy R.R.*, 257 U.S. 563, 589 (1922) (legislative history is "only admissible to solve doubt and not to create it").

C. The Absence of Limits Suggests An Implied Repeal Was Not Intended.

Section 158(d) does not enumerate the provisions that it purportedly eliminates in the bankruptcy context. Clearly Congress has not provided a list. *See United States v. Fausto*, 484 U.S. 439, 453, *reh'g denied*, 485 U.S. 972 (1988) ("[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."). It is arguable that if section 158(d) precludes any particular appellate jurisdiction, such as section 1292, then it should preclude everything, including appellate review on writs of mandamus[34] and expedited review under the Norris-LaGuardia Act.[35] If, on the other hand, the theory of implied

[34] The courts, however, cannot agree on this issue. *Compare In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985) (after concluding that § 158(d) excluded § 1292, court granted writ of mandamus without treating question of whether exclusivity of section 158(d) extended to the All Writs Act) *and In re Teleport Oil Co.*, 759 F.2d 1376, 1378 (9th Cir. 1985) (finding mandamus available) *with In re Kaiser Steel Corp.*, 911 F.2d 380, 386 (10th Cir. 1990) (observing that "the appellate nature of mandamus subjects it to the same limitations under § 158(d) as exist on our review of a district court's appellate decision under section 158(a)"). *See also In re Atencio*, 913 F.2d 814, 816 n.1 (10th Cir. 1990) (suggesting limitations on review by writ of mandamus).

[35] 29 U.S.C. § 110. *But see Elsinore Shore Assoc. v. Local 54, Hotel Employees*, 820 F.2d 62, 65-67 (3d Cir. 1987) (permitting direct review of an injunction involving a labor dispute issued by a bankruptcy judge in the court of appeals pursuant to 29 U.S.C. § 110).

exclusivity advanced by the courts does not go this far, there is no principle limiting the extent of the implied repeal to be found in either section 158(d) or its legislative history.[36]

The court below recognized that there may well be sound policy concerns militating against the conclusion that section 158(d) should be construed as an exclusive provision. *Germain*, 926 F.2d at 197 (J.A. 46). The Third Circuit has aptly addressed one of the more significant of these concerns:

> Coastal contends that the jurisdictional provisions of the Bankruptcy Act of 1978 (Bankruptcy Code) [sections 1293 and 1334 now codified in relevant part as sections 158(a) & (d)] preclude the exercise of this court's reviewing authority over [the questions presented]. Those provisions, Coastal contends, preempt sections 1291, 1292 and 1651. In its view, the Bankruptcy Code intended to place all pendente lite rulings of a bankruptcy court beyond the reach of the courts of appeals and the Supreme Court. Since the federal appellate courts have had the remedial powers conferred by section 1651 since 1789, and those conferred in section 1292(a)(1) since 1891, Coastal's proposition is that the Bankruptcy Code placed the bankruptcy courts in a position in which their pendente lite rulings are to be more insulated from appellate review than those of any civil federal court in history. On its face the proposition seems extreme.
>
> . . .

[36] The court below stated that:

> Section 1291 is clearly "repealed" with regard to all interlocutory decisions of bankruptcy courts except for those for which leave to appeal is granted by a district court under Section 158(a). The "repeal" we infer from Section 158(d) is thus part of a far greater explicit repeal.

Germain, 926 F.2d at 197 (J.A. 46). Nowhere in its opinion, however, does the court specifically identify what this "far greater explicit repeal" is or explain what interlocutory decisions were originally covered by section 1291.

> [The unavailability of interlocutory appellate review of orders in bankruptcy proceedings is] a question of enormous significance, involving the power of this court and of the Supreme Court to review such important matters as preliminary injunctions issued in the vast range of cases entertainable [in bankruptcy cases]. If Coastal is right, the bankruptcy courts have been given pendente lite powers, subject only to district court review, equivalent to those exercised by the federal circuit courts prior to the passage of the Evarts Act in 1891.

Coastal Steel, 709 F.2d at 197-99.

The Third Circuit ultimately declined to adopt Coastal's contentions and resolved the matter by holding that an order of the district court sitting in review of the bankruptcy court was, concurrent with section 158(d), reviewable under sections 1291, 1292 and 1651 as orders of the district court in their own right, thus avoiding the exclusivity issue. *Id.* at 199-200. In so holding, the court of appeals observed that it doubted that Congress intended such a sweeping repeal of appellate jurisdiction in the bankruptcy context, particularly in light of the absence of any discussion of such a change or of its anticipated impact. *Id.* at 200 n.7.

Where, as here, legislative history to support such an intent does not exist, and where acceptance of the concept of exclusivity would do violence to the purposes and principles underlying Congress' enactment of section 1292(b),[37] an interpretation that denies its applicability to one category of district court rulings should not be inferred.

[37] *See supra* notes 7 and 8.

VI. SUBSEQUENT LEGISLATIVE ACTION SUGGESTS THAT SECTION 158(d) WAS NOT INTENDED TO EXCLUDE APPLICATION OF SECTION 1292(b).

This Court has acknowledged that subsequent congressional actions may provide some insight into the original legislative intent. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980). *See also Bell v. New Jersey*, 461 U.S. 773, 784-5 (1983) (view of later Congress may have "persuasive value").[38] Legislative action in 1990 suggests that Congress did not intend to foreclose section 1292(b) interlocutory appeals in bankruptcy cases when it enacted section 158.

Section 1334(c)(2) of title 28 concerns district court abstention in non-core bankruptcy cases[39] while section 305(c) of title 11 concerns bankruptcy court abstention in general.[40] In 1990, Congress added language to both of these provisions to limit the availability of appeals under section 1292.[41] If, in 1978, Congress had intended to foreclose section 1292 appeals in bankruptcy, then it would be truly anomalous for Congress to determine it necessary to expressly prohibit such appeals in sections 305(c) and 1334(c)(2) with regard to certain bankruptcy abstention orders. *See generally Rodriguez*, 480 U.S. at 524, 525; *Russello v. United States*, 464 U.S. 16, 23 (1983).

Further, when Congress added these limitations on appeals, it also amended section 158.[42] Congress did not at that time, however, include any language in section 158(d) limiting appeals under section 1292. The fact that Congress has expressly limited the availability of section 1292 with regard to sections 1334(c)(2) and 305(c), but has not done so in section 158(d), is supportive of the conclusion that Congress never intended section 158(d) to have a preclusive effect on section 1292(b). *See Andrus*, 446 U.S. at 666 n.8.

---

[38] This recognition is usually followed by an admonition cautioning against the careless use of such inferences. *E.g., United States v. Price*, 361 U.S. 304, 313 (1960). The present case would not appear to present a situation where the analysis of later enactments is a hazardous venture. *Cf. Pension Benefit Guar. Corp. v. LTV Corp.*, ___ U.S. ___, 110 S. Ct. 2668, 2678 (1990).

[39] Section 1334(c)(2) is a mandatory abstention provision requiring abstention only with regard to "related to" proceedings where: (i) but for section 1334(b), the proceeding could not have been commenced in federal court and (ii) the proceeding is commenced and can be timely adjudicated in the appropriate state court. 1 *Collier on Bankruptcy* ¶ 3.01, 3-75.

[40] Section 305 concerns abstention from hearing an entire case. *See* 2 *Collier on Bankruptcy* ¶ 1 305.1, 305-2. It is a discretionary provision applicable *inter alia* where the interests of creditors and the debtor would be better served by dismissal or suspension of the entire bankruptcy matter.

[41] The two statutes as amended provide in pertinent part:

> Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise *by the courts of appeals under section 158(d), 1291, or 1292 of this title (continued)*

[41] *(continued)*

> *or by the Supreme Court of the United States under section 1254 of this title.*

28 U.S.C. § 1334(c)(2) (1990 amendment emphasized).

> An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise *by the court of appeals under section 158(d), 1291, or 1292 of this title [sic] or by the Supreme Court of the United States under section 1254 of this title [sic].*

11 U.S.C. § 305(c) (1990 amendment emphasized). *See* Pub. L. No. 101-650, § 309(a)-(b), 104 Stat. 5113.

[42] The 1990 amendments to section 158 were to the bankruptcy appellate panel provisions of section 158(b), effective December 1, 1991. Pub. L. No. 101-650, § 305, 104 Stat. 5105. Section 158(d) was not changed.

CONCLUSION

When Congress enacted section 1292(b) of title 28, it clearly intended by the plain meaning of the section's provisions that the jurisdictional grant contained in it would be applicable to bankruptcy cases. Courts have long recognized this intent and the enactment of the legislation which was eventually codified as section 158(d) should not be deemed to have repealed the applicability of section 1292(b) to any degree. Nothing in the words of section 158(d) hints at such repeal and no clear and manifest legislative intent to accomplish such a repeal can be found in its legislative history.

Therefore, the Petitioner, The Connecticut National Bank, respectfully requests this Court to hold that section 1292(b) provides discretionary jurisdiction in the court of appeals to hear an interlocutory appeal of a district court decision in a bankruptcy proceeding originating in the bankruptcy court and, further, to remand this case to the Second Circuit Court of Appeals for consideration of the Petition for Leave to Appeal filed by the Petitioner.

Janet C. Hall*
G. Eric Brunstad, Jr.
Robinson & Cole
One Commercial Plaza
Hartford, CT 06103

Counsel for Petitioner
The Connecticut National Bank

*Counsel of Record

November 29, 1991